

1 for the District of Arizona in consolidation with In re: Mortgage
2 Electronic Registration Systems (MERS) Litigation, Case No. 2:09-md-
3 02119-JAT, but the case appears eligible for transfer. Now pending
4 are a motion to dismiss (#8) filed by Defendants BAC Home Loans
5 Servicing, LP ("BAC"), Mortgage Electronic Registration Systems,
6 Inc. ("MERS") and ReconTrust Company, N.A. ("ReconTrust")
7 (collectively, "Defendants"); a motion for hearing (#19) on the
8 motion to dismiss filed by Defendants BAC, MERS and ReconTrust; and
9 a motion (#21) to amend/correct complaint filed by Plaintiff. The
10 motions are ripe, and we now rule on them.

11 12 **I. Factual Background**

13 Plaintiff alleges that on or about December 17, 2004, Plaintiff
14 executed a note in the amount of \$311,900 (the "Mortgage Note") in
15 favor of lender Greenpoint Mortgage Funding, Inc. ("Greenpoint") and
16 a deed of trust (the "Deed of Trust") with respect to real property
17 located at 214, 216, 218 Moran Street, Reno, Nevada 89501 (the
18 "Property"). (Compl. ¶ 35 (#1 Ex. 1).) The Deed of Trust was
19 recorded by Stewart Title of Northern Nevada on December 27, 2004.
20 (Id.) ReconTrust, as agent for BAC, executed a document entitled
21 "Notice of Default/Election to Sell under Deed of Trust," which was
22 recorded by First American National Default on September 16, 2010
23 (the "Notice of Default"). (Id. ¶ 36.) The Notice of Default was
24 signed by Charlotte Almos as agent for Defendant First American
25 Title Insurance Comp. ("First American"), as agent for ReconTrust,
26 as agent for BAC. (Id.) The Notice of Default states that
27 ReconTrust is the duly appointed or substituted Trustee and is

1 acting as agent for the trustee or beneficiary under the Deed of
2 Trust. (Id.)

3 4 II. Procedural Background

5 Plaintiff filed her complaint (#1 Ex. 1) in state court on
6 December 13, 2010. MERS filed a petition for removal (#1) to this
7 Court on January 20, 2011. On February 7, 2011, Defendants BAC,
8 MERS and ReconTrust filed a motion (#8) to dismiss. Plaintiff
9 opposed (#16) and Defendants replied (#17). On May 5, 2011,
10 Defendants BAC, MERS and ReconTrust filed a motion (#19) for hearing
11 regarding the motion (#8) to dismiss. On May 27, 2011, Plaintiff
12 filed a motion (#21) to amend/correct complaint. Defendants BAC,
13 MERS, and ReconTrust filed a response (#22) on June 13, 2011, as did
14 Defendant Greenpoint (#23). Plaintiff replied (#24) on June 24,
15 2011.

16 17 III. Motion to Amend Standard

18 Federal Rule of Civil Procedure 15(a)(2) provides that other
19 than with respect to an amendment to a pleading within twenty-one
20 days after such pleading was served, a party may amend its pleading
21 only with the opposing party's written consent or the court's leave.
22 FED. R. CIV. P. 15(a)(2). The court should freely give leave when
23 justice so requires. Id.

24 The right to amend is not, however, absolute. See Kendall v.
25 Visa U.S.A., Inc., 518 F.3d 1042, 1051 (9th Cir. 2008). The court
26 may deny leave to amend where amendment would be futile. Id. See

1 also Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004); Eminence
2 Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

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4 **IV. Plaintiff's Motion (#21) to Amend**

5 Plaintiff requests leave to amend her complaint (#1 Ex. 1)
6 based on nine claims and to add Charlotte Almos, an employee of
7 Defendant First American. We find that amendment of Plaintiff's
8 complaint on these grounds would be futile.

9 **A. Plaintiff's Claim for Debt Collection Violation is a Futile**
10 **Amendment (Count 1)**

11 Plaintiff proposes a new claim arising out of the Federal Fair
12 Debt Collection Practices Act ("FDCPA"). (Prop. Am. Compl. ¶ 62.)
13 Plaintiff does not dispute that Defendants are initiating a non-
14 judicial foreclosure (Id.), which is not a debt collection practice,
15 nor that the FDCPA does not apply to a non-judicial foreclosure.
16 See, e.g., Maves v. First Horizon Home Loans, 2010 U.S. Dist. LEXIS
17 97387 (D. Nev. Sept. 15, 2010). See also Diessner v. Mortgage Elec.
18 Registration Sys., Inc., 384 F. App'x 609 (9th Cir. 2010). Further,
19 this District and other courts have rejected the theory that the
20 deed in question "split" from the note through securitization,
21 rendering the note an unsecured debt subject to the FDCPA. Vega v.
22 CTX Mortg. Co., LLC, 761 F. Supp. 2d 1095 (D. Nev. 2011); In re
23 Mortgage Elec. Registration Sys. (MERS) Litig., 2011 U.S. Dist.
24 LEXIS 7232 at *5 (D. Ariz. Jan. 25, 2011) (rejecting the "note-split-
25 from-the-deed" theory and finding that "Nevada case law universally
26 holds that these deeds are enforceable"). Amendment of the

1 complaint (#1 Ex. 1) to include Plaintiff's first proposed
2 additional claim would therefore be futile.

3 B. Plaintiff's Claim for Unfair and Deceptive Trade Practice is
4 a Futile Amendment (Count 2)

5 Plaintiff's second proposed new claim arises from her
6 contention that sending notices of default requires a debt
7 collector's licence, and so Defendants violated Nevada Revised
8 Statutes §§ 598.0923(1) and (3). (Prop. Am. Compl. ¶ 73.) Nevada
9 Revised Statutes §§ 598.0923(1) and (3) do not apply to non-judicial
10 foreclosures. Subsection 1 does not apply because it deals with
11 business licenses. Erickson v. PNC Mortg., 2011 U.S. Dist. LEXIS
12 46387 (D. Nev. Apr. 27, 2011); Maves, 2010 U.S. Dist. LEXIS 97387
13 (D. Nev. Sept. 15, 2010); Charov v. Perry, 2010 U.S. Dist. LEXIS
14 65798 (D. Nev. June 30, 2010). Subsection 3 does not apply because
15 it deals only with a sale or lease of goods or services and does not
16 cover a mortgage foreclosure on real property. Alexander v. Aurora
17 Loan Servs., 2010 U.S. Dist. LEXIS 68172 (D. Nev. July 8, 2010).
18 Amendment of Plaintiff's complaint to include the second proposed
19 new claim would therefore be futile.

20 C. Plaintiff's Claim for Unfair Lending Practices is a Futile
21 Amendment (Count 3)

22 Plaintiff's third proposed new claim, for unfair lending
23 practices pursuant to Nevada Revised Statutes § 598D, is futile
24 because it is time-barred. An action "upon statute for penalty or
25 forfeiture" has a two-year statute of limitations unless the statute
26 provides otherwise. NEV. REV. STAT. § 11.190(4)(b). The plain
27 language of § 598D indicates that it is a statute for a penalty and
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1 does not contain its own limitations period. NEV. REV. STAT. §
2 598D.110; Freeto v. Litton Loan Serv., L.P., 2010 U.S. Dist. LEXIS
3 19949 (D. Nev. Mar. 5, 2010). Plaintiff obtained her loan from
4 Defendants in 2004, but did not file her complaint until December
5 13, 2010. (Prop. Am. Compl. ¶ 7.) She does not allege any facts to
6 support a request to toll the limitations period. Amendment to
7 include Plaintiff's third proposed new claim for unfair lending
8 practices is therefore futile, as such claim is time-barred.

9 D. Plaintiff's Claim for Breach of the Contractual Covenant of
10 Good Faith is a Futile Amendment (Count 4)

11 Plaintiff's fourth proposed additional claim is for breach of
12 the contractual covenant of good faith with respect to an alleged
13 proposed loan modification. (Prop. Am. Compl. ¶ 85.) Plaintiff also
14 claims that Defendants breached the covenant of good faith by
15 approving Plaintiff for a loan she could not afford. (Id. ¶ 83.)
16 Amendment to include Plaintiff's claims for breach of contractual
17 covenant of good faith would be futile because these claims relate
18 to conduct that occurred before the loan was executed and,
19 therefore, before there was a contract. Larson v. Homecomings Fin.,
20 LLC, 680 F. Supp. 2d 1230, 1236 (D. Nev. 2009). Amendment to
21 include Plaintiff's fourth proposed claim would therefore be futile.

22 E. Plaintiff's Claim for Wrongful Foreclosure in Violation of
23 Nevada Revised Statutes § 107.080 is Futile (Count 5)

24 Plaintiff's fifth proposed additional claim for violation of
25 Nevada Revised Statutes § 107.080 is futile. Plaintiff's claim is
26 based on a contention that the foreclosure is invalid because
27 Defendants did not present the original note, an argument this Court
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1 and others have rejected repeatedly. See, e.g., Villa v. Silver
2 State Fin. Servs., Inc., 2011 U.S. Dist. LEXIS 54510 (D. Nev. May
3 20, 2011); Roberts v. McCarthy, 2011 U.S. Dist. LEXIS 41464 (D. Nev.
4 April 8, 2011); Urbina v. Homeview Lending Inc., 681 F. Supp. 2d
5 1254 (D. Nev. 2009).

6 Specifically, Plaintiff alleges that ReconTrust, as agent for
7 BAC, as agent for MERS, had no right to file the notice of default.
8 (Prop. Am. Compl. ¶¶ 92-103 (#1 Ex. 1.)) However, Plaintiff fails
9 to cite any authority under Nevada to support this assertion.
10 Nevada Revised Statutes § 107.080 does not require that a particular
11 party - trustee, beneficiary or their assigns - record notices of
12 default or trustee sale. Berilo v. HSBC Morg. Corp., 2010 U.S. Dist.
13 LEXIS 64599 (D. Nev. June 29, 2010). ReconTrust recorded the notice
14 of default as an authorized agent of the loan servicer, BAC, as
15 agent for the beneficiary of the Deed of Trust, MERS. Thus,
16 Plaintiff's allegation regarding the identity of the party who
17 recorded the notice cannot create an actionable claim, and amendment
18 to include Plaintiff's fifth proposed claim would therefore be
19 futile.

20 F. Plaintiff's Claim for Quiet Title is Futile (Count 6)

21 Plaintiff's sixth proposed additional claim is for quiet title.
22 (Prop. Am. Compl. ¶ 106.) Amendment to include this claim would be
23 futile because Plaintiff repeats her argument that the note split
24 from the deed through securitization, which argument fails, as we
25 have explained above. Vega v. CTX Mortg. Co., LLC, 761 F. Supp. 2d
26 1095 (D. Nev. 2011); In re Mortgage Elec. Registration Sys. (MERS)
27 Litig., 2011 U.S. Dist. LEXIS 7232 at *5 (D. Ariz. Jan. 25, 2011)

1 Further, Plaintiff has failed to allege her ability to tender the
2 amount owed on the debt, as is required for a quiet title claim.
3 Anderson v. Deutsche Bank Nat'l Tr. Co., 2010 U.S. Dist. LEXIS
4 120865 (D. Nev. Oct. 29, 2010); Kraemer v. Kraemer, 382 P.2d 394
5 (Nev. 1963). We therefore find that amendment to include
6 Plaintiff's sixth proposed additional claim for quiet title would be
7 futile.

8 G. Plaintiff's Claim for Fraud is Futile (Count 7)

9 Amendment to include Plaintiff's seventh proposed additional
10 claim for fraud would be futile because such claim is time-barred.
11 Nevada Revised Statutes § 11.190(3)(d) provides a three-year statute
12 of limitations for fraud claims. Here, Plaintiff's loan was
13 originated in December 2004. (Prop. Am. Compl. ¶ 146.) Plaintiff
14 filed her complaint in December 2010, approximately six years after
15 the loan origination, and Plaintiff has not made any factual
16 allegation to support an argument for tolling the statute of
17 limitations. Plaintiff asserts that she discovered the fraud "at
18 the time...the complaint was filed," but does not explain her
19 failure to discover Defendants' alleged fraud sooner. Campbell v.
20 Wells Fargo Home Mortg., 2010 U.S. Dist. LEXIS 86451 (C.D. Ca. July
21 27, 2010) (denying tolling on statute of limitations for fraud when
22 plaintiff "supplie[d] no factual allegations in support of her
23 conclusory claim"). We therefore find that amendment to include
24 Plaintiff's claim for fraud would be futile.

25 H. Plaintiff's Claim for Slander of Title is Futile (Count 8)

26 Amendment to include Plaintiff's eighth proposed additional
27 claim for slander of title would be futile because Plaintiff does
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1 not dispute that she was in default on her mortgage, and so the
2 recording of the Notice of Default was not falsely done. (Prop. Am.
3 Compl. ¶ 149.) Ramos v. Mortgage Elec. Registration System, Inc.,
4 2009 U.S. Dist. LEXIS 124874 (D. Nev. March 4, 2009) (dismissing
5 slander of title because "Plaintiffs do not dispute that they were
6 in default on their loan"). Because Plaintiff's abuse of process
7 claim fails to state a viable claim, amendment to add such claim
8 would be futile.

9 I. Plaintiff's Claim for Abusive of Process is Futile (Count 9)

10 Amendment to include Plaintiff's ninth proposed additional
11 claim for abuse of process would be futile because non-judicial
12 foreclosure is not the type of "process" addressed by the abuse of
13 process tort, as it does not involve judicial action. Riley v.
14 Greenpoint Morg. Funding, Inc., . See also Bull v. McCuskey, 615
15 P.2d 957, 960 (Nev. 1980) (rev'd on other grounds); Ace Truck &
16 Equip. Rentals, Inc. v. Kahn, 746 P.2d 132 (Nev. 1987).

17 J. Amendment of Plaintiff's Complaint Would Be Futile

18 As detailed above, amendment of Plaintiff's complaint would be
19 futile, as there is clearly established case law refuting each of
20 Plaintiff's proposed additional claims. We will therefore deny
21 Plaintiff's motion (#21) to amend/correct complaint.

22 V. Motion to Dismiss Standard

23 Courts engage in a two-step analysis in ruling on a motion to
24 dismiss. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Bell Atlantic
25 Corp. v. Twombly, 550 U.S. 544 (2007). First, courts accept only
26 non-conclusory allegations as true. Iqbal, 129 S. Ct. at 1949.
27 "Threadbare recitals of the elements of a cause of action, supported
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1 by mere conclusory statements, do not suffice." Id. (citing Twombly,
2 550 U.S. at 555). Federal Rule of Civil Procedure 8 "demands more
3 than an unadorned, the-defendant-unlawfully-harmed-me accusation."
4 Id. Federal Rule of Civil Procedure 8 "does not unlock the doors of
5 discovery for a plaintiff armed with nothing more than conclusions."
6 Id. at 1950. The Court must draw all reasonable inferences in favor
7 of the plaintiff. See Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d
8 943, 949 (9th Cir. 2009).

9 After accepting as true all non-conclusory allegations and
10 drawing all reasonable inferences in favor of the plaintiff, the
11 Court must then determine whether the complaint "states a plausible
12 claim for relief." Iqbal, 129 S. Ct. at 1949. (citing Twombly, 550
13 U.S. at 555). "A claim has facial plausibility when the plaintiff
14 pleads factual content that allows the court to draw the reasonable
15 inference that the defendant is liable for the misconduct alleged."
16 Id. at 1949 (citing Twombly, 550 U.S. at 556). This plausibility
17 standard "is not akin to a 'probability requirement,' but it asks
18 for more than a sheer possibility that a defendant has acted
19 unlawfully." Id. A complaint that "pleads facts that are 'merely
20 consistent with' a defendant's liability... 'stops short of the line
21 between possibility and plausibility of 'entitlement to relief.'"
22 Id. (citing Twombly, 550 U.S. at 557).

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24 **VI. Defendants' Motion (#8) to Dismiss**

25 Defendants filed a motion (#8) to dismiss Plaintiff's complaint
26 pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to
27 state a claim upon which relief can be granted.

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1 Capital, 2011 U.S. Dist. LEXIS 72169 (D. Nev. July 5, 2011);
2 Camacho-Villa v. Great Western Home Loans, 2011 U.S. Dist. LEXIS
3 37063 (D. Nev. Mar. 23, 2011); . See also Hulse v. Ocwen Fed. Bank,
4 FSB, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002); Izenberg v. ETS
5 Servs., LLC, 589 F. Supp. 2d 1193 (C.D. Cal. 2008). See also
6 Heinemann v. Jim Walter Homes, Inc., 47 F. Supp. 2d 716, 722 (N.D.W.
7 Va. 1998). Plaintiff's third claim will therefore be dismissed.

8 C. Claim 4 for Unfair and Deceptive Trade Practices

9 Plaintiff's fourth claim for violations of unfair and deceptive
10 trade practices pursuant to Nevada Revised Statutes § 598.0923 also
11 fails as a matter of law. Under that statute, a person engages in
12 deceptive trade practices when, in the course of his or her business
13 or occupation, he or she knowingly conducts the business or
14 occupation without all required state, county or city licenses. §
15 598.0923(1). However, the Nevada Revised Statutes explicitly state
16 that the following activities do not constitute doing business in
17 this State: (1) maintaining, defending or settling any proceeding;
18 (2) creating or acquiring indebtedness, mortgages, and security
19 interests in real or personal property; and (3) securing or
20 collecting debts or enforcing mortgages and security interests in
21 property securing the debts. NEV. REV. STAT. § 80.015(1)(a), (g)-(h).
22 Because Defendants are explicitly exempt from acquiring licenses in
23 this mortgage case, we dismiss Plaintiff's fourth cause of action.

24 D. Claim 5 for Unfair Lending Practices

25 Plaintiff's fifth cause of action for unfair lending practices
26 is time-barred. Nevada Revised Statutes § 598D provides a two-year
27 statute of limitations for claims of unfair lending practices. As
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1 stated previously, Plaintiff obtained her loan in 2004 and filed her
2 complaint (#1 Ex. 1) in 2010. She fails to allege any facts to
3 support a request to toll the limitations period. Plaintiff's fifth
4 cause of action for unfair lending practices pursuant to Nevada
5 Revised Statutes § 598D is therefore untimely and will be dismissed.

6 D. Claim 6 for Breach of the Implied Covenant of Good Faith and
7 Fair Dealing

8 Plaintiff's sixth cause of action for breach of the covenant of
9 good faith and fair dealing fails as a matter of law.

10 Under Nevada law, "[e]very contract imposes upon each party a
11 duty of good faith and fair dealing in its performance and
12 execution." A.C. Shaw Constr. v. Washoe County, 105 Nev. 913, 914
13 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). This
14 duty requires each party not to do anything to destroy or otherwise
15 injure the rights of the other to receive the benefits of the
16 contract. Hilton Hotels Corp. v. Butch Lewis Productions, Inc., 107
17 Nev. 226, 234 (1991). To prevail on a cause of action for breach of
18 the implied covenant of good faith and fair dealing, a plaintiff
19 must show: (i) the existence of a valid, enforceable contract; (ii)
20 the defendant's performance in a manner that is unfaithful to the
21 purpose of the contract and the justified expectations of the
22 plaintiff; and (iii) resulting damages sustained by the plaintiff.
23 Perry v. Jordan, 111 Nev. 943, 948 (1995). It therefore follows
24 that the implied covenant of good faith and fair dealing only
25 extends to parties to the contract. Contreras v. Master Fin., Inc.,
26 2011 U.S. Dist. LEXIS 996 at *7-8 (D. Nev. Jan. 4, 2011); Bhadra v.
27 State Farm Fire & Cas. Co., 2010 U.S. Dist. LEXIS 64618 at *10 (D.

1 Nev. June 1, 2010); Vargas v. California State Auto. Ass'n Inter-
2 Insurance Bureau, 788 F. Supp. 462, 465 (D. Nev. Mar. 12, 1992).

3 Here, Plaintiff alleges that there was a breach of the covenant
4 of good faith and fair dealing because Defendants led her to believe
5 that they would modify her loan. (Compl. ¶ 81 (#1 Ex. 1).) Because
6 there is no loan modification contract between the parties, however,
7 Plaintiff fails to state a claim as a matter of law. Additionally,
8 Plaintiff's allegation that Defendants breached the covenant of good
9 faith and fair dealing by initiating foreclosure proceedings on the
10 original loan is without merit. (Id. ¶ 83.) Plaintiff's sixth cause
11 of action will therefore be dismissed.

12 E. Claim 7 for Wrongful Foreclosure in Violation of Nevada
13 Revised Statutes §§ 107.080 and 645F.440

14 Plaintiff's claim that Defendants violated Nevada Revised
15 Statutes § 645F.440 fails as a matter of law. NRS § 645F.440 details
16 the remedies for rescinding a foreclosure sale. Here, there has
17 been no foreclosure sale of the property. (MTD at 9 (#8).)
18 Plaintiff's claims under § 645F.440 will therefore be dismissed.

19 An action for wrongful foreclosure pursuant to Nevada Revised
20 Statutes § 107.080 requires that, at the time of the foreclosure
21 sale, the plaintiff was not in breach of the mortgage contract.
22 Ellifritz v. Netbank, 2010 U.S. Dist. LEXIS 139065 (D. Nev. Dec. 28,
23 2010); Haley v. Elegen Home Lending, LP, 2010 U.S. Dist. LEXIS 24590
24 (D. Nev. Mar. 15, 2010); Collins v. Union Federal Sav. & Loan Ass'n,
25 662 P.2d 610, 623 (D. Nev. 1983). Here, Plaintiff admits that she
26 was in default on her mortgage obligation. (Compl. ¶ 47.) As such,

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1 there can be no sustainable action for wrongful foreclosure pursuant
2 to § 107.080 .

3 Furthermore, a claim for wrongful foreclosure does not arise
4 until the power of sale is exercised. Haley, 2010 U.S. Dist. LEXIS
5 24590 at *4; Collins, 662 P.2d at 623. The Property has not yet
6 been sold. (MTD at 9 (#8).) As such, Plaintiff's claim for wrongful
7 foreclosure is premature and not actionable.

8 Finally, the securitization of a loan does not create a cause
9 of action. Joyner v. Bank of Am. Home Loans, 2010 U.S. Dist. LEXIS
10 75936 (D. Nev. July 26, 2010).

11 F. Claim 8 for Quiet Title

12 Plaintiff's eighth cause of action is for quiet title. A quiet
13 title action is the proper method by which to adjudicate disputed
14 ownership of real property rights. Joyner, 2010 U.S. Dist. LEXIS
15 75936 at *14 (D. Nev. July 26, 2010). Though not properly a cause
16 of action, an action to quiet title is an equitable proceeding in
17 which a party seeks to settle a dispute over ownership of property
18 or to remove a cloud on title to the property. Id. at *14-15;
19 MacDonald v. Krause, 362 P.2d 724 (Nev. 1961). The Ninth Circuit
20 Court of Appeals has affirmed that trial courts have inherent
21 equitable discretion to bar a claim for lack of tender if the
22 failure to tender renders the remedy unenforceable. Yamamoto v. Bank
23 of N.Y., 329 F.3d 1167, 1173 (9th Cir. 2003). This District has
24 adopted the "widely accepted" Tender Rule that a party pursuing a
25 quiet title claim must tender the undisputed amount due and owing to
26 challenge the validity of a sale or title to the property. See also
27 Abdallah v. United Savings Bank, 43 Cal. App. 4th 1101, 1109 (1996).

1 Here, Plaintiff has not tendered the amount owed on her loan.
2 She has failed to plausibly allege that Defendants lack the
3 statutory ability to foreclose on the Property pursuant to Nevada
4 Revised Statutes § 107.080, nor that she is not in breach of the
5 loan agreement. Plaintiff's claim for quiet title will therefore be
6 dismissed.

7 G. Claims 9 and 10 for Fraud through Omission and Fraud in the
8 Inducement

9 Plaintiff also fails to state a claim in her ninth and tenth
10 causes of action for fraud.

11 Under Nevada law, a claim for fraud in the inducement requires
12 a party to prove each of the following elements: (1) a false
13 representation; (2) knowledge or belief that the representation was
14 false (or knowledge that the defendant had an insufficient basis for
15 making the representation); (3) intent to induce the plaintiff to
16 consent to the contract's formation; (4) justifiable reliance upon
17 the misrepresentation; and (5) damage resulting from such reliance.
18 J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc., 89 P.3d 1009,
19 1017 (Nev. 2004). A claim for fraudulent concealment requires that
20 the "defendant must have been under a duty to disclose the fact to
21 the plaintiff." Nev. Power Co. v. Monsanto Co., 891 F. Supp. 1406,
22 1415 (D. Nev. 1995).

23 "In alleging fraud or mistake, a party must state with
24 particularity the circumstances constituting fraud or mistake." FED.
25 R. Civ. P. 9(b). In order to meet the heightened pleading
26 requirements, a plaintiff must specify the time, place and content
27 of the misrepresentation as well as the names of the parties
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1 involved. See *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n. 10
2 (9th Cir. 1999). In a case with multiple defendants, "Rule 9(b)
3 does not allow a complaint to merely lump multiple defendants
4 together but requires plaintiffs to differentiate their allegations
5 when suing more than one defendant and inform each defendant
6 separately of the allegations surrounding his alleged participation
7 in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir.
8 2007) (internal quotation marks and citation omitted).

9 Plaintiff's claims fail to satisfy the heightened pleading
10 standard of Rule 9(b). Plaintiff's allegations in support of these
11 claims are vague and conclusory, asserting only that Defendants
12 failed to disclose certain facts about the inner workings of the
13 mortgage industry and failed to explain to Plaintiff that she was
14 not qualified to enter the loan on the stated terms. (Compl. ¶¶ 109
15 - 119 (#1 Ex. 1).) Plaintiff's ninth and tenth claims for relief
16 thus fail to satisfy the requirements of Rule 9(b) and will be
17 dismissed.

18 H. Claim 11 for Unjust Enrichment

19 Plaintiff alleges, generally, that Defendants have been
20 unjustly enriched by virtue of their "unethical, unsound lending
21 practices." (Compl. ¶ 121 (#1 Ex. 1).) To set forth a claim for
22 unjust enrichment, a plaintiff must allege that a defendant unjustly
23 retained money or property of another against fundamental principles
24 of equity. *Contreras v. Master Fin., Inc.*, 2011 U.S. Dist LEXIS 996
25 at *10 (D. Nev. Jan. 4, 2011). See also *Asphalt Prods. Corp. v. All*
26 *Star Ready Mix*, 898 P.2d 699, 700 (Nev. 1995). However, an action
27 for unjust enrichment cannot stand when there is an express written
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1 contract which guides the activities of the parties. LeasePartners
2 Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975, 942 P.2d 182,
3 187 (Nev. 1997).

4 Here, Plaintiff entered into a written contract with respect to
5 the mortgage on the Property, namely, the Deed of Trust and the
6 Mortgage Note. These documents guided the interactions, obligations
7 and rights of the parties. As such, Plaintiff cannot make a claim
8 for unjust enrichment with respect to actions that are controlled by
9 a contract to which Plaintiff is a party. Contreras v. Master Fin.,
10 Inc., 2011 U.S. Dist. LEXIS 996 at *10. See also LeasePartners
11 Corp., 942 P.2d at 187-88. Plaintiff's claim for unjust enrichment
12 will therefore be dismissed.

13 I. Conclusion With Respect to Motion (#8) to Dismiss

14 We have found that Plaintiff has failed to state a claim upon
15 which relief can be granted with respect to any of the eleven causes
16 of action set forth therein. Defendants' motion (#8) to dismiss will
17 therefore be granted.

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19 **VII. Defendants' Motion (#19) for Hearing**

20 We have found that Plaintiff's complaint (#1 Ex. 1) fails to
21 state a claim upon which relief can be granted with respect to any
22 of the eleven causes of action set forth therein. Because we will
23 grant Defendants' motion (#8) to dismiss, a hearing with respect to
24 the motion will not be necessary. Defendants' motion (#19) for
25 hearing will therefore be denied.

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VIII. Conclusion

Now pending are a motion to dismiss (#8) filed by Defendants BAC Home Loans Servicing, LP ("BAC"), Mortgage Electronic Registration Systems, Inc. ("MERS") and ReconTrust Company, N.A. ("ReconTrust"); a motion (#19) for hearing on the motion to dismiss filed by Defendants BAC, MERS and ReconTrust; and a motion (#21) to amend/correct complaint filed by Plaintiff. We will grant the motion (#8) to dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Because we grant Defendants' motion (#8) to dismiss, we find no compelling reason to hold a hearing on the motion, and so we deny Defendants' motion (#19) for hearing. We have found that amendment of Plaintiff's complaint would be futile, and so Plaintiff's motion (#19) to amend/correct complaint will be dismissed.

IT IS, THEREFORE, HEREBY ORDERED that Plaintiff's motion (#21) to amend is **DENIED**.

IT IS FURTHER ORDERED that Defendants' motion (#8) to dismiss is **GRANTED**.

IT IS FURTHER ORDERED that Defendants' motion (#19) for hearing is **DENIED**.

DATED: July 15, 2011.


UNITED STATES DISTRICT JUDGE